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August 20, 2020

Via FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Facsimile: (202) 566-2147

RE: Freedom of Information Act Request for all Records Regarding How EPA Will Convey the Message to Nonacquiesce to *Iowa League of Cities*

To Whom This May Concern:

This is a request for public records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. Section 552, as implemented by the Environmental Protection Agency ("EPA") at 40 C.F.R. Part 2. For purposes of this request, the definition of "records" includes, but is not limited to, documents, letters, memoranda, notes, reports, e-mail messages, policy statements, data, technical evaluations or analysis, and studies.

Background

On November 15, 2013, EPA held a meeting with EPA senior management to discuss the Agency's decision to not follow the Eighth Circuit's decision in *Iowa League of Cities* outside the Eighth Circuit in future permitting matters. See attachment ("In permitting actions occurring outside the 8th Circuit, EPA does not intend to change its approach to applying the bypass provision to POTWs that blend."). The briefing sheet utilized for that meeting included the following language with respect to communicating the Agency's regulatory position:

How will we convey this message outside of the Agency?

- Verbal statements, such as to NACWA
- Written document from OGC or OW
- Statement on website
- Comments to State
- Formal actions (e.g., objection letter or enforcement action)

Request

This request seeks any records, developed after November 14, 2013, within the Offices of Water, General Counsel, and Enforcement and Compliance Assurance that discuss the means by which EPA should or should not inform the public, states, and regional offices regarding the Agency's NPDES program policy decision. In particular, whether this decision should be distributed in writing or communicated only verbally.

To assist the search for responsive records to this request, the following EPA personnel were involved in the development and implementation of this matter and should be in possession of responsive records: Steven Neugeboren, Deborah Nagle, Nancy Stoner, Kevin Weiss, Avi Garbo, James Vinch, MaryEllen Levine, Connie Bosma, Joseph Theis, Andrew Saywers, and Richard Witt.

Please contact the undersigned if the associated search and duplication costs are anticipated to exceed \$50.00. Please duplicate the records that are responsive to this request and send it to the undersigned at the address above. If the requested record is withheld based upon any asserted privilege, please identify the basis for the non-disclosure.

If you have any questions regarding this request, please do not hesitate to contact this office so as to ensure that only the necessary document is duplicated.

Sincerely,

Erin Thomas
Hall & Associates

Attachment –
November 15, 2013 Briefing Document

Inside Eighth Circuit

- This is a significant decision that changes the landscape on the way we look at permits at facilities that blend. We are still trying to work through potential issues.
- All NPDES permits, including those for POTW discharges, need to have a bypass provision that is at least as stringent as EPA's regulations at 40 CFR 122.41(m).
- For a facility that blends, the permit/fact sheet should have a clear identification of the treatment train that will be used during dry and wet weather.
- Permits for POTWs that blend will not have internal permit limitations (unless end-of-pipe effluent limits are impracticable), only end-of-pipe limits.
- NPDES permits are to require monitoring to yield data that is representative of the monitored activity (see 122.48(b)). For facilities that blend during wet weather, permits should clearly specify that compliance monitoring include end-of-pipe monitoring when wet weather treatment trains are in operation.

- In Iowa League of Cities, the Court had problems with saying that the bypass provision imposes secondary treatment standards on side-stream treatment prior to blending or requires biological treatment for side-stream treatment.
- In the Eighth Circuit, we will review permits for POTWs that blend on a case-by-case basis.

Outside of Eighth Circuit

- by 25 June 2015*
- The Iowa League of Cities decision is ~~not~~ applicable inside the Eighth Circuit.
 - EPA agrees that under 122.44(h)(1), NPDES permits for discharges from POTWs should not establish internal permit effluent limitations based on the secondary treatment regulations unless limitations at the point of discharge are impractical or infeasible.
 - In permitting actions occurring outside the 8th Circuit, EPA does not intend to change its approach to applying the bypass provision to POTWs that blend.
 - The bypass provision defines bypass to mean the "intentional diversion of waste streams from any portion of a treatment facility."
 - The regulation prohibits bypasses except where necessary for essential maintenance to assure efficient operation.
 - The bypass regulation provides that the Director of the NPDES authority may approve an anticipated bypass, after considering its adverse effects, if the Director determines that the bypass will meet the criteria identified in the regulation, including a showing of 'no feasible alternatives'
 - In general, flows diverted around a treatment unit would constitute a bypass regardless of whether or not the diverted flows receive additional treatment after the diversion occurs.

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What we said in Region 7

- A Court of Appeals decision applies within the Circuit for which it was written
- See discussion under 'Inside Eighth Circuit'

October 30, 2013 Meeting

- Option 1 - The decision only prohibits NPDES permits from imposing permit limits on internal waste streams within a POTW. The bypass regulation continues to apply to flows diverted around a treatment unit regardless of whether or not the diverted flows receive additional treatment after the diversion occurs.
- Option 2 – In addition to prohibiting internal limits, the decision prohibits permit writers from requiring permittees that blend to comply with the conditions of the bypass rule. EPA cannot dictate treatment design.
- Option 2 was decided on at the meeting

Subsequent Discussions

- As we attempted to develop a written statement, a new option, Option 1.5, has emerged.
- Option 1.5 - In Iowa League of Cities, the Court had problems with saying that the bypass provision imposes secondary treatment standards on side-stream treatment prior to blending or requires biological treatment for side-stream treatment. Thus the decision prohibits NPDES permit writers from:
 - imposing internal limits on waste streams within a POTW; and
 - from requiring that side stream treatment include biological treatment.